Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-890

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

JAMES GARLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

JAMES GARLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, which reversed a judgment of the County Court, Westchester County, convicting James Garland of the crimes of Rape in the First Degree, Assault in the Second Degree, Unlawful Imprisonment in the First Degree and Assault in the Third Degree and sentencing him as a persistent felony offender to concurrent terms of 15 years—life, 15 years—life, 15 years—life and one year.

Citation to the Opinions Below

The certificate denying leave to appeal to the New York Court of Appeals is reported at 42 N.Y. 2d 1096 (Appendix A).

The Opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department is reported at 59 App. Div. 2d 538, —— N.Y.S. 2d —— (Appendix B).

The certificate denying leave to appeal to the New York Court of Appeals from the order reversing the trial order of dismissal is unreported (Appendix C).

The Opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department reversing the trial order of dismissal is reported at 42 App. Div. 2d 768, 346 N.Y.S. 2d 47 (Appendix D).

The Opinion of the County Court, Westchester County granting a trial order of dismissal is unreported (Appendix E).

Jurisdiction

The order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department was dated and entered August 1, 1977.

The certificate denying leave to appeal to the New York Court of Appeals was dated September 19, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

Question Presented

Do the New York statutes which allow an appeal by the People from a trial order of dismissal granted on motion by the defendant and a retrial of the defendant upon reversal by the appellate courts offend the Constitution?

Facts

October 9, 1971 was a nice fall day, one on which a night stroll would be pleasant. Thus, when Joanne Gretzler arrived home at approximately 10:30 P.M. she decided to go for a walk around her neighborhood, a residential area in which she had lived for twelve years. As she was returning toward her house, a car stopped a few feet ahead of her and the driver asked her something, she thought directions. Joanne walked over to the car, bent her head down next to the passenger door to ask what the driver had said and was pulled into the car by the hair. The assailant was the defendant James Garland.

The defendant closed the door, hit the victim on the head once or twice and continued to drive away. After having driven a few blocks, the defendant stopped the car and when the victim tried to get out closed the door and repeatedly hit her head with what appeared to be a bottle. The victim felt her face which was wet and warm, grabbed the rear view mirror, looked and saw a big hole on her forehead. In response to the victim's statement that she was bleeding and getting blood all over the car, the defendant replied, "so". While in the car, the victim touched the rear view mirror, the passenger door and window, the head rest on the passenger side and the arm rest with her bloodied hands.

As a car passed, the defendant pulled Joanne's head to his lap. He then drove to another location, stopped and locked the doors. The defendant told Joanne to go over the seat to the rear and he did likewise. The victim was lying in the back seat with her head on the passenger side when she was undressed and raped by the defendant. Joanne was allowed to get dressed and was then told to climb back into the front seat. The defendant told his victim that he could have killed her and it wouldn't have mattered and then said he was sorry. The defendant then drove back towards where he had first assaulted his victim,

stopped, again said that he was sorry, that he could have killed her, and asked if he could see her again. The victim laughed, said, "Sure, I am always around," opened the door and got out.

Joanne started to walk away, turned, looked at the license plate, repeating it to herself, and then went to the first house that had a light. Mrs. Gabbert, who answered the "frantic pounding" at the door, described what she saw: "There was a young girl standing there. There was blood running down her face. She was disheveled. She was in a state of shock. She was distraught. She said, "Oh God. Help me. Please help me." After trying to calm Joanne who was trembling and moaning, Mrs. Gabbert called the police. The victim told the officer who responded that she had been beaten and raped and described the defendant and his car, including the license numbers that she remembered.

The victim was taken to the hospital where the wounds on her head were cleaned and sutured and a cervical smear taken.

The police checked the two plate numbers given by the victim and by transposing two numbers in one of the combinations found that it was registered to a car matching the description given by Joanne and owned by James Garland.[1] The defendant was arrested and his car searched. The car contained blood in the places Joanne said it would and the blood on the rug, which was of a sufficient quantity to type, was the same as that of the victim. In the back seat where the victim said her head had been, hair was found which when compared to strands taken from her head was found to be of a consistent origin.[2]

The defendant announced before the first trial that he would present an alibi defense and on the second did in fact present an alibi defense. The defendant's sister,

[1] The car had not been reported stolen.

[2] The victim had blonde hair. The defendant is black.

daughter and a friend testified that the defendant had been with them and a number of other people on a bus tour to Peg Leg Bates' Country Club, a tour organized by the Order of the Eastern Star.

At the conclusion of the People's case, the trial court held that the physical evidence found in the defendant's car was not legally sufficient to corroborate the victim's testimony identifying Garland as her assailant[3] and on the defendant's motion entered a trial order of dismissal.[4] The People appealed.[5] By order of the Supreme Court of the

[3] Penal Law § 130.15 *Sex offenses: corroboration.*

A person shall not be convicted of any offense defined in this article or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim. This section shall not apply to the offense of sexual abuse in the third degree. (Amended L. 1972, ch. 373)

[4] Criminal Procedure Law § 290.10 *Trial order of dismissal.*

1. At the conclusion of the people's case or at the conclusion of all the evidence, the court may, except as provided in subdivision two, upon motion of the defendant, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

[5] Criminal Procedure Law § 450.20 *Appeal by people to intermediate appellate court; in what cases authorized.*

An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court:

2. A trial order of dismissal, entered pursuant to section 290.10 or 360.40.

Criminal Procedure Law § 450.40 *Appeal by people from trial order of dismissal.*

1. An appeal by the people from a trial order of dismissal, as authorized by subdivision two of section 450.20, may, as indicated by section 290.10, be based either (a) upon the ground that the evidence adduced at the trial was legally sufficient to support the count or counts of the accusatory instrument dismissed by the order, or (b) upon the ground that, though not legally sufficient, such evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people.

State of New York, Appellate Division, Second Judicial Department dated July 23, 1973, the order of the trial court was "unanimously reversed, on the law, indictment reinstated, and new trial ordered" (*People* v. *Garland,* 42 App. Div. 2d 768, 346 N.Y.S. 2d 47 (1973)). Leave to appeal to the New York Court of Appeals was denied by order of Honorable Adrian P. Burke, dated October 24, 1973. Retrial commenced on April 23, 1975 and on July 16, 1975 the defendant was sentenced as a persistent felony offender to a term of 15 years-life. Upon appeal by the defendant from the judgment of conviction, the judgment was, by order of the Appellate Division dated August 1, 1977, unanimously reversed on the law and the indictment dismissed (*People* v. *Garland,* 59 App. Div. 2d 538, —— N.Y.S. 2d —— [1977]). By order of Honorable Charles D. Breitel, dated September 19, 1977, leave to appeal to the Court of Appeals was denied (42 N.Y. 2d 1096).

POINT I

The New York Statute allowing an appeal by the people from a trial order of dismissal is constitutional.

At the close of the People's case, the defendant moved to dismiss the charges against him alleging that there was legally insufficient evidence[6] to support the charges against him as there was a failure of corroboration required by statute.[7] The trial judge ruled that there was sufficient corroboration of every element except the victim's testimony identifying the defendant as the rapist.[8] The People appealed and the Appellate Division unanimously reversed and remanded for a new trial.

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[6] The trial was before a jury, and they were the only ones who could rule on the factual issues.

[7] Penal Law § 130.15.

[8] The ruling was one of law, not fact. As stated by the Appellate Division, "The appeal did not present questions of fact."

Under the New York statutory scheme, the legal sufficiency of the trial evidence may be first raised and considered at four separate junctures: (1) The defendant may move for a trial order of dismissal at the close of the People's evidence or the case; (2) The trial judge may *sua sponte* grant a trial order of dismissal by not presenting a count to the jury; (3) The defendant may move to set aside the verdict;[9] (4) The defendant may raise the issue on appeal. The choice is in the hands of the defendant. By statute when a trial order of dismissal is granted at the defendant's request, the People can appeal and if there is a reversal, the defendant must stand trial anew.[10] If the trial judge does not present a count to the jury but the defendant has not moved, the trial order of dismissal does not come within the confines of CPL 290.10(1) and the People cannot appeal (CPL 450.20(2)). If the trial judge sets aside the verdict on motion by the defendant under CPL § 330.30(1), the People can appeal (CPL § 450.20(3)) and upon reversal the verdict would be reinstated. If the issue is raised on appeal and the appellate court finds a legal insufficiency, it must dismiss and in no event would a new trial be thereby necessitated.[11] The defendant, aware of

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[9] Criminal Procedure Law, § 330.30 *Motion to set aside verdict; grounds for*

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

[10] Criminal Procedure Law 290.10(1); 450.20(2).

[11] Criminal Procedure Law § 470.20 *Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification.*

(footnote continued on following page)

the statutory scheme, by deciding to raise the issue by moving for a trial order of dismissal knowingly made an intentional relinquishment of his right to not again be placed in jeopardy (*Johnson* v. *Zerbst,* 304 U.S. 458, 81 LEd 1461).

If a violation of the defendant's protection against double jeopardy would result, there is no question that an appellate reversal of an order would offend the Constitution. In the absence of such violation, a statute such as that in New York does not offend the Constitution and an appeal by the People is permissible. The granting of a motion to dismiss before jeopardy attaches may be appealed by the People as the defendant will only be subject to one trial (*Serfass* v. *United States,* 420 U.S. 377, 43 LEd 2d 265 (1975)). The granting of a motion to dismiss after verdict may be appealed by the People as on reversal the verdict would be reinstated and no new trial necessitated (*United States* v. *Wilson,* 420 U.S. 332, 43 LEd 2d 232 (1975)). If there is a judgment of acquittal, by the Court or jury, clearly there can be no appeal by the People. (*United States* v. *Martin Linen Supply Company,* —— U.S. ——, 51 LEd 2d 642 (1977)). Absent "manifest necessity," if a trial is aborted without the defendant's consent, there can be no appeal by the People and no retrial of the defendant (*United States* v. *Jenkins,* 420 U.S. 358, 43 LEd 2d 250 (1975); *United States* v. *Jorn,* 400 U.S. 470, 27 LEd 2d 543

(footnote continued from preceding page)

Upon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or directed is governed in part by the following rules:

2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.

(1971)). It is into yet another category that the New York statute falls, a motion to dismiss by the defendant which allows the People to appeal and a new trial.

There is no question that a defendant can waive his right to be twice placed in jeopardy (*Schneckloth* v. *Bustamonte,* 412 U.S. 218, 36 LEd 2d 854 (1973); *Green* v. *United States,* 355 U.S. 184, 2 LEd 2d 199 (1957)). If the defendant moves to dismiss prior to verdict knowing that if a motion granting that relief is reversed on appeal by the People (and having alternative forms of relief available), he will have to stand trial anew, he has waived his privilege against double jeopardy (*Lee* v. *United States,* —— U.S. ——, 53 LEd 2d 80 (1977); *United States* v. *Dinitz,* 424 U.S. 600, 47 LEd 2d 267 (1976)).

> "Where the defendant, by requesting a mistrial,[12] exercised his choice in favor of terminating the trial, the Double Jeopardy Clause generally would not stand in the way of reprosecution."
>
> *Lee* v. *United States, supra.*

The defendant's choice in the instant case was well reasoned based upon a thorough knowledge of the statutory provisions. After hearing the evidence of the brutal attack and listening to and observing the victim, the defendant was aware of the fact that a conviction was inevitable. If the defendant proceeded by appeal, he might have served part of his sentence before it was decided; if he moved to set aside the verdict, he would have been free pending appeal, but upon reversal would have had to serve his sentence based upon the guilty verdict; if he secured a trial order of dismissal, he would be free pending appeal and upon reversal possibly the People could not prove their case. Standing trial again when possibly the evidence

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[12] ". . . the distinction between dismissals and mistrials has no significance in the circumstances here presented . . ."

would not be so great was clearly the most advantageous alternative available to the defendant.

The New York statute allowing an appeal by the People from a trial order of dismissal granted on the defendant's motion is constitutional.

POINT II

Certiorari should be granted.

The New York Court of Appeals, until the decisions of this Court in *Wilson, Jenkins* and *Serfass,* had found the statutes in question to be constitutional. Then, "under constraint of these decisions," in *People* v. *Brown,* 40 N.Y. 2d 381, 386 N.Y.S. 2d 848 (1976), cert. den. —— U.S. ——, 53 Ed. 2d 1099 (1977), the Court held the statutes invalid under the Constitution of the United States:

> "We recently rejected a similar constitutional challenge to the People's statutory right to appeal such an order (*People* v. *Fellman,* 35 NY2d 158, mot to amd remittitur granted 35 NY2d 853). Subsequent to our decision in *Fellman,* however, the United States Supreme Court decided three cases which cast grave doubt as to the continuing viability of the *Fellman* decision (*United States* v. *Wilson,* 420 US 332; *United States* v. *Jenkins,* 420 US 358, *supra,* decided Feb. 25, 1975; *Serfass* v. *United States,* 420 US 377, decided less than a week later on March 3, 1975). We reach our decision today under constraint of these decisions, and accordingly overrule our holding to the contrary in *People* v. *Fellman* (35 NY2d 158, *supra*)."

If the protection against double jeopardy is a constitutional right which can be affirmatively waived by a defendant, which indeed it is, the New York defendant who wishes to obtain a benefit by waiving that right should be able to do so. Under the statutory scheme the defendant has absolute discretion to decide when he wants to raise

the issue of the legal sufficiency of the evidence (he does not have to raise the issue prior to verdict) and if he decides to do it prior to verdict knowing that there may be a new trial, there is no violation of any of his constitutional rights, and no prejudice to the People if they can appeal.

The New York statutory scheme protects valuable rights of both the defendant and the People and is violative of none of the defendant's constitutional rights.

CONCLUSION

The New York statutes permitting an appeal by the People from a trial order of dismissal granted on motion of the defendant and permitting, on reversal, the re-trial of the defendant do not offend the Constitution.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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By Janet Cunard
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Appendix "A", Certificate Denying Leave.

COURT OF APPEALS
STATE OF NEW YORK

Before: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JAMES GARLAND,

Defendant-Respondent.

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
September 19, 1977

CHARLES D. BREITEL
Chief Judge

Hon. Carl A. Vergari
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Clerk, Court of Appeals

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* Description of Order: 8/1/77 App Div 2, reversed and dismissed indictment in memo. 7/16/75 Co. Ct., Westchester Co.

Appendix "B", Opinion.

59 AD2d 538 A/mc

The People, etc., respondent,
v. James M. Garland, appellant.

Richard S. Scanlan, White Plains, N.Y., for appellant.

Carl A. Vergari, District Attorney, White Plains, N.Y. (Stanley Levine of counsel), for respondent.

Appeal by defendant from a judgment of the County Court, Westchester County, rendered July 16, 1975, convicting him of rape in the first degree, assault in the second and third degrees and unlawful imprisonment in the first degree, upon a jury verdict, and imposing sentence.

Judgment reversed, on the law, and indictment dismissed.

Our ruling is constrained by the holding in *People* v *Brown* (40 NY2d 381). 386 NYS 2d 848 (1976) 17 CrL 2316

MARTUSCELLO, J.P., MARGETT, SUOZZI and O'CONNOR, JJ., concur.

August 1, 1977 PEOPLE v GARLAND, JAMES M. 990 E

Appendix "C", Certificate Denying Leave.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. ADRIAN P. BURKE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JAMES GARLAND,

Appellant.

CERTIFICATE DENYING LEAVE

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York, New York
October 24, 1973

ADRIAN P. BURKE
Associate Judge

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* Description of Order: Appellate Division, Second Department, order dated July 24, 1973.

Appendix "D", Opinion.

12 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. JAMES GARLAND, Respondent.—Appeal by the People from a trial order of dismissal of the County Court, Westchester County, made on April 25, 1972, at the close of the People's case upon a jury trial. The indictment had charged defendant with rape in the first degree, assault in the second degree (two counts) and unlawful imprisonment. Order reversed, on the law, indictment reinstated, and new trial ordered. The appeal did not present questions of fact. The complainant identified defendant as the man who had raped her and testified that in the course of the incident he struck her over the head with a bottle, causing lacerations and bleeding. She had intentionally placed blood from her wound on portions of the assailant's vehicle. She further testified that she was raped on the back seat, with her head on the right-hand side of the car. A search of defendant's automobile revealed numerous type "O" blood stains; and hair strands were found on the back seat, where the complainant testified her head had rested. After being subjected to scientific examination, the blood and hair samples were found to be compatible with their having come from the complainant. In our opinion this is sufficient to predicate a finding that the rape took place in defendant's car and thus to corroborate his identity as the rapist (cf. *People* v. *Linzy*, 31 N Y 2d 99). Hopkins, Acting P. J., Munder, Martuscello, Gulotta and Christ, JJ., concur.

Appendix "E", Motions.

The Court: Thank you Doctor you are excused.

Mr. Maffei: If I may have one moment Your Honor.

The Court: Yes, Mr. Maffei.

Mr. Maffei: Your Honor at this point the People will rest.

The Court: Will both Counsel approach the bench.

(Conference at the bench between both Counsel and the Court.)

The Court: Ladies and Gentlemen of the jury the People have rested, Defense Counsel would like an opportunity to present motions in detail to the Court, outside the presence of the jury so under the circumstances I'm going to give the jury a recess until tomorrow morning at ten o'clock so the jury is excused, please remember my admonition be back here at tomorrow morning at ten o'clock.

(Where upon the proceedings were adjourned until April 25, 1972.)

(Court resumed April 25, 1972 in Court's Chambers outside the presence of the jury, Defendant and all Attorneys present.)

The Court: Mr. Waldhorn.

Mr. Waldhorn: Your Honor at this time I'm going to dismiss all the counts of the indictment on the grounds that the People have failed to make a prima facie case, that there is a lack of corroboration which is needed in this kind of sexual case. The law provides that all of the material elements in the case set forth in the indictment must be proved and corroborated by prosecution. The three most important elements are sexual penetration, the use of force and the identification of the assail-

ant. As to the injuries in this case, the use of force, there is no proof except her own testimony, there was no testimony by a medical doctor or anyone else in fact that the beating was competent cause of the injuries. Nobody testified in this case that the injuries were caused by a beating. The only testimony was from the girl and there was no corroboration concerning the injuries that she received. As to the Third count of this indictment, the assault in the second degree, by means of a dangerous weapon to wit a bottle. There is absolutely no proof that the weapon was used in this case, no evidence that a bottle was used, none whatever in my opinion. I would ask that that count be dismissed along with the other counts of this indictment. I would ask that the case be dismissed on the facts and the law, not having been proved beyond a reasonable doubt. The only testimony in this case is the testimony of the girl and there is absolutely no corroboration whatsoever. The People have attempted to show corroboration by circumstantial evidence. They are asking the Court to infer certain facts, but the facts that they are asking you to infer are based upon conjecture and speculation. The girl testified rather there has been testimony that the hair is similar to the young girl's and that it was found in the car. The inference is that because its similar its hers, but then they are asking you to draw another inference to put another inference based upon an inference that because its hers that she was in the car. The same would be true of the other item the blood. They're asking you to base an inference on an inference that it was her blood. I would ask that the case be dismissed. Certainly the inference of the hair it could be anybody's and also the blood, 43 per cent of the People of the World have the same type of blood. Therefore, I respectfully ask that the case be dismissed in its entirety.

Mr. Maffei: Your Honor, just briefly taking Mr. Waldhorn's first argument that of the medical aspect of the

beating and that there was no testimony that her injuries were the result of a beating, I think the proof in the case is clear, you take Joanne Gretzler's testimony, you take Patrolman Ambrosino's testimony and you take the stipulation as to what Mrs. Dixon the registered nurse of the Emergency room has testified to and it leads you irretrievable to one conclusion, you have her saying she was hit, you have Patrolman Ambrosino saying she was bleeding and you have after the arrival of Patrolman Ambrosino and her being taken to the Emergency room of the hospital and you have the emergency room nurse and the treatment that was administered. There is only one conclusion that can be drawn from this.

As far as the element of corroboration in this case is concerned the People would submit that every aspect of the case has been corroborated, force as I just said, the fact that there has been penetration or the testimony of Joanne Gretzler saying there was an act of intercourse performed on her and the finding of spermatoza on the cervical smear and added to the fact the finding of seminal fluid in the underpants turned over to the Police.

Third I think the question of identification there is circumstantial corroboration and in all of the cases they say only that corroboration in a sex case must be one that tends to prove the main fact. There are a number of cases which say that corroboration may be circumstantial, *People vs. Rea,* 165, N. Y. Supp. 835 and coming up to even cases cited as early as 1960, *People vs. Tewilliger,* cited back in 26 N. Y. Supp. 675, long establishes the law the corroborative evidence need not be direct it can be circumstantial, the fact that we have here a number of circumstances tending to prove the identity of this defendant, one a license plate number, a description of the car, the fact that there was blood where Miss Gretzler said there was blood, the fact that there was the same type of hair found in a portion of the car where she testified she was during the course

of this alleged rape and the scientific testimony that it is consistent with a common source. All of these circumstances tend to prove the corroboration in this case and the People would submit, each and every material facet of this case has been corroborated and even going as far back as *People vs. Massei,* I believe which would bear out the fact that corroboration can be had be circumstantial evidence which tends to prove the fact that must be corroborated.

The Court: Mr. Waldhorn.

Mr. Waldhorn: Judge, may I be heard as to whether or not the beating was a competent cause of the injuries. This girl testified that she was in a park on a swing and that there was another man there by the name of Columbo, she could easily have fallen off that swing and got hurt in this fashion. We should in this case at least have some proof that the injuries she sustained in the car were caused by the beating she got in the car and we have no such proof, we only have her word and the cop testifying to that she was bleeding but there is no proof of a beating in the car if she got one in the car, that is my argument here. And, of course, there is no proof whatsoever that she was hit with any dangerous instrument.

The Court: Well, I think we will dispose of the obvious. First, I think it has been proved that something did occur, that the complainant was sexually penetrated and I think there is corroboration on that point. Second, there is evidence that the penetration was without the complainant's consent.

The Court must now ask very pointedly of the District Attorneys Office in view of your opposition that there must be corroboration of every element, every material element of the crime, what corroboration is there of the identification other than the complainant's testimony.

Mr. Maffei: Your Honor, the complainants testimony, the fact of the car, the fact of the blood in the car, matching her type, the fact of the hair in the car.

The Court: That testimony establishes that the complaining witness was in the car, what about the identification of the defendant in the car.

Mr. Maffei: Your Honor, I would submit to the court that these facts coupled with her identification of him, again prove the identification of this defendant. I don't believe that the corroborative evidence, the law requires that the corroboration of this witnesses testimony must also prove the guilt of this defendant.

The Court: I agree with your principals but I have to go back and ask you pointedly, other than her testimony that this is the defendant, what points to him as being at the scene of the crime or that he perpetrated the crime?

Mr. Maffei: My answer to you—

The Court: The totality of the circumstances, of the circumstances concerning the car coupled with her testimony.

Mr. Maffei: Yes.

Mr. Waldhorn: But the car doesn't put him there.

The Court: The Court has reviewed many, many, cases with respect to corroboration, *People vs. Massei, People vs. Dagonne* (Phonetics) a series of cases and the Court finds that there must be corroboration of the identity of the defendant's identity other than the testimony of the complainant. There is nothing other than her testimony and the automobile in and of itself is insufficient as a matter of fact I think in the *Dagonne* case if I am correct in the name held that the automobile coupled with a ring that the defendant was wearing, a similar case there was a surgical scar on the defendant, plus there was something other than the automobile a subsequent re-visit to the scene. I think that was the *Masse* case where somebody went back to the scene, but here I see no evidence of corroboration with respect to the presence of the defendant at the scene of the car. He was never placed in the car, never seen at the car, he was never placed at the scene of the incident other then by the testimony of the complaining witness.

Under the circumstances the Court must dismiss the first count of the indictment with respect to counts two, three and four, the Court is opened to further argument.

Mr. Waldhorn: Well, Your Honor, now has dismissed the first count, you must dismiss all of the counts because in a case like this the sex crime and there is an assault and a kidnapping and they're all part of a common scheme and plan of rape as alleged in the first count the Court must then dismiss all the counts of the indictment. If I may look through here I think I have another case or did I leave it home, I don't know where I have this, I have it here somewhere Judge, give me a minute.

(Slight pause.)

Mr. Waldhorn: There cannot be an assault or any kidnapping where it is tied into the rape, as part of the rape. If the rape is dismissed the assault and kidnapping must follow. I have the case someplace but it said that if the rape is dismissed there cannot be a conviction on the other charges, there could be in robbery but not of an assault where it is tied in with a sex offense nor of the kidnapping which is all connected to the sex crime.

The Court: Mr. Maffei.

Mr. Waldhorn: I have it right here, unlawful imprisonment that is the same as kidnapping here was alleged to have been committed and it held where a complainant testified as to a rape the People could not without corroboration make out a prima facie case of unlawful imprisonment on the complainants testimony. The People should not be permitted to avoid the corroboration necessary by charging a lesser related crime. Now I have something else here, developing the rule extending to the requirements for corroboration in cases of rape to other crimes. It would be logical to dismiss the other counts directly related to crimes such as rape, or committed in the aid of affecting a rape, of course in some cases I have read Robbery is not such a crime but assault and kidnapping is connected to the rape, therefore, they must all be

dismissed. There can be no conviction of an assault when it is connected with the sex crime and when the sex crime itself is dismissed.

Mr. Maffei: I believe in this case we must look at the indictment, there were three separate situations here charging three different jurisdictions.

Mr. Waldhorn: One jurisdiction, Westchester County.

Mr. Maffei: We actually have four crimes charged here in the indictment, taking place in three different areas. In the first place we have unlawful imprisonment and I don't see how we can say at this point that the commission of this crime was in aid or in furtherance of his intent to commit the crime of rape.

The Court: Which Count?

Mr. Maffei: The Fourth count.

The Court: That is with respect to unlawful imprisonment. There was also an assault at the scene of the alleged rape. Is that assault in the 2° under the third count.

Mr. Waldhorn: Judge may I read the last paragraph of this indictment. All of the transactions in this indictment, all of the transactions, acts alleged in each of the several counts of this indictment are connected and constitute parts of a common scheme and plan. He tried to get away from that part of the indictment, now. It says it right here there connected together and constitute a common scheme and plan, right in the indictment.

The Court: Mr. Maffei, go ahead.

Mr. Maffei: Your honor I still feel that you have three separate instances, you have unlawful imprisonment, taking place in Bronxville, rape taking place in the Town of Eastchester, while both Bronxville and Eastchester are in the same physical county, you have two separate jurisdictions, two separate areas.

The Court: Well, Gentlemen, the Court directs both Counsel's attention to section 120.05 of the Penal Law and section or Article 130 of the Penal Law and also to

the case of *People vs. McEaddy* 30 N. Y. reports 2nd page 519, advance sheets law reports number 846 April 12, 1972, if I can lift something out of context, "The Appellate Division vacated the Assault conviction upon the ground that the Penal Law, 120.05 subdivision 6, excluded assaults committed during the commission of sex offenses defined in article 130 of said law. Which included rape, from the purview of the category of Assaults, committed in furtherance of the commission of the felony." Another case *People vs. Butt,* 30 Appellate Division 2nd 814, where the defendant was convicted of Assault in the 2° but acquitted of the rape in the 1° both charges originating from the same facts that the verdict was improper, since an acquittal on the rape charge may have resulted from the lack of corroboration as to the rape and the conviction for the crime of assault, committed in the furtherance of the rape cannot stand where there is no corroboration of the complainant's testimony that she was raped.

Now it would appear to me therefore, with respect to the third count that the assault took place at the alleged scene and from the testimony of the complainant it was in furtherance of the crime of rape under those cases under those circumstances and under that section of the penal code the Court dismisses the third count of the indictment.

Now with respect to the remaining counts 2 and 4, I would address myself to the remarks of Mr. Waldhorn, when he read from the indictment, all of the acts and transactions alleged in each of the several counts of this indictment are connected together and constitute parts of a common scheme and plan. He's asking now that the other two counts be dismissed as they are all tied together.

Mr. Maffei: Your Honor, I would first of all object to your dismissing any of the counts of this indictment because I feel the People have sustained their case of corroboration as well as factually. We feel that there has

been sufficient corroboration as far as the identity of this defendant is concerned and concerning the second, third and fourth counts of this indictment the People would feel again that these should not be dismissed although the indictment does allege that all of the acts and transactions constitute a common scheme and plan they can in fact be separated while the indictment may allege that they are totally connected together, the fact of the matter remains that they are separate and individual crimes.

The Court: The Court will reserve decision on the last motion with respect to dismissing counts two and four.

Mr. Waldhorn: Will the Court look at *People vs. Coven,* 28 Appellate Division 2nd 1098.

The Court: Now, is there going to be further testimony, I have reserved on this.

Mr. Waldhorn: Are you going to tell the jury of this point?

The Court: No, sir. I don't think its proper procedure.

Mr. Waldhorn: Then the first count is out and the third count is out.

Mr. Maffei: May I have an exception noted for the record, Your Honor.

The Court: Yes, sir. And the Court would like to put on the record that here again the requirement of corroboration on the identification is a very harsh burden for the District Attorney's Office and joins with the many legal writings including Justice Madonick in that this is a very unfair burden to place on the prosecution.

Mr. Waldhorn: I may agree with your Honor's statement, however, it is the law today and we are bound by it.

The Court: Yes, sir.

(Court recessed.)

(Court resumed after recess in chambers. Defendant and all Attorneys present.)

The Court: Mr. Maffei you still wish to be heard with respect to the motion I reserved on.

Mr. Maffei: No, Your Honor.

The Court: The Court has reconsidered the argument with respect to the dismissal of Counts 2 and 4 and grants the motion to dismiss. The Defendant is discharged.

Mr. Maffei: May I have an exception to your ruling for the record.

The Court: All right. The Defendant is discharged. Now, I am going to call the jury down and advise them that there has been a disposition in this case.

(Whereupon the Court resumed in the presence of the jury and the jury was then dismissed.)

(Whereupon the proceedings were concluded.)